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IN THE

Supreme Court of the United States

October Term, 1958.

No. 598

SOUTHERN CALIFORNIA GAS COMPANY, a corporation,
Petitioner,

vs.

CITY OF LOS ANGELES, a municipal corporation,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

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SUBJECT INDEX

	PAGE
Citations to opinions below	1
Jurisdiction	2
Question presented	2
Constitutional provisions and statutes involved	2
Statement of the case	3
Reasons for granting writ	6
1. The decision below creates an unanswered problem of national importance as to conflicting rights to the use and occupancy of underground space for service facilities in congested population centers	6
2. The decision below unconstitutionally assesses customers of a public utility to pay relocation costs for a purely local improvement without any benefit therefrom	8
3. Lower courts and legislatures are in doubt as to respective rights and duties of public utilities and governmental agencies as to compensation for required relocations	9
4. The effect of the decision below is that a service installed under franchise has no vested protection from subsequent encroachment by a public agency	13
Conclusion	15

Appendices:

Appendix "A." Opinion of the District Court of Appeal ..... App. p. 1

Appendix "B." Opinion of the Supreme Court of the State of California:

Majority Opinion ..... App. p. 5

Concurring Opinion ..... App. p. 13

TABLE OF AUTHORITIES CITED

CASES PAGE

California v. Marin Municipal Water Dist., 17 Cal. 2d 699, 111 P. 2d 651 3

Chicago v. Sheldon, 9 Wall. (U. S.) 50, 19 L. Ed. 594 ..... 11, 14

Chicago B. & Q. Ry. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 11

Chicago B. & Q. Ry. v. Drainage Commission, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596 ..... 11, 12

City of Kansas v. Corrigan, 86 Mo. 67 14

City of Los Angeles v. Los Angeles Gas and Electric Corp., 251 U. S. 32, 40 S. Ct. 76, 64 L. Ed. 121 14

City of St. Louis v. Western Union Telephone Company, 148 U. S. 92, 13 S. Ct. 485, 37 L. Ed. 380 14

Cortez National Gas Company, Inc., Re, 14 P. U. R. 3d 105 8

Gast Realty & Investment Company v. Schneider Granite Co., 240 U. S. 55, 36 S. Ct. 254, 60 L. Ed. 523 9

Lake Shore Ry. Co. v. Clough, 242 U. S. 375, 37 S. Ct. 144, 61 L. Ed. 374 ..... 11, 12

Monongahela Navigation Company v. United States, 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463 15

New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453, 25 S. Ct. 471, 49 L. Ed. 831 ..... 11, 12

Panhandle Eastern Pipeline Co. v. State Highway Commission, 294 U. S. 613, 55 S. Ct. 563, 79 L. Ed. 1090 ..... 11, 12, 13

Russell v. Sebastian, 233 U. S. 195, 34 S. Ct. 517, 58 L. Ed. 912, L. R. A. 1918E 882 ..... 14, 15

State ex rel. City of Kansas v. Corrigan Consolidated Street Ry. Co., 85 Mo. 263, 55 Am. Rep. 361 14

State of Wisconsin v. J. C. Penney Co., 311 U. S. 435, 61 S. Ct. 246, 85 L. Ed. 267 9

Western Light & Telephone Company, Inc., 10 P. U. R. 3d 70 8

PAGE

Western Union Telephone Co. v. Police Jury, 225 La. 531, 73 So. 2d 450 14

STATUTES

California Public Utilities Code, Sec. 10101 et seq. 3

Deering's Water Code, Act 4463, Sec. 16, p. 349 11

Federal Aid Highway Act of June 29, 1956, Sec. 111(a) (70 Stat. 374) 10

United States Constitution, Fourteenth Amendment 5

TEXTBOOKS

Los Angeles Substructure Committee (1952), p. 3, Subsurface Traffic Interference 7

61 Public Utilities Fortnightly, p. 729, Abrams, New York Underground 7

Public Works, June, 1956, Coordinating Subsurface Utility Installations 7

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SOUTHERN CALIFORNIA GAS COMPANY, a corporation,
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CITY OF LOS ANGELES, a municipal corporation,
Respondent.

Petition for Writ of Certiorari to the Supreme Court of the State of California.

Petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of the State of California entered in the above entitled case on August 29, 1958, petition for rehearing of which was denied on September 24, 1958.

Citations to Opinions Below.

Judgment was entered for Petitioner in the Superior Court on September 26, 1956 [R. 49], predicated on its Findings of Fact and Conclusions of Law [R. 47-48]. The decision of the District Court of Appeal, affirming unanimously the judgment of the trial court, is printed in Appendix A hereto, *infra*, p. 1, and reported in 155 A. C. A. 929 and 318 P. 2d 735. The opinion of the

Supreme Court of California reversing the judgment of the Superior Court and vacating the judgment of the District Court of Appeal is printed in Appendix B hereto, *infra*, p. 5, and is reported in 50 A. C. 661, 329 P. 2d 289.

Jurisdiction.

The judgment of the Supreme Court of the State of California was entered on August 29, 1958 [App. B, p. 5, and Clk. Tr.]. A timely Petition for Rehearing was filed therein by Petitioner on September 15, 1958 [Clk. Tr.] and was denied on September 24, 1958 [Clk. Tr.]. The jurisdiction of this Court is invoked under 28 U. S. C. 1257 (2) since the rights, privileges and immunities of the Petitioner since the inception of the case have been and are now claimed under the guaranties and protections of the Constitution of the United States.

Question Presented.

Is public utility property, installed under franchise in the ever increasingly congested space under urban streets to provide an essential service to the public, protected by the due process clause from forced removal without just compensation to make way for other underground facilities to be installed by a public agency not a party to the franchise outside its own jurisdiction?

Constitutional Provisions and Statutes Involved.

The constitutional provision involved is the due process clause of the Fourteenth Amendment. No statutes are involved.

Statement of the Case.

The case below was tried and all evidence and exhibits were received upon an agreed statement of facts [R. 16-46].

Petitioner, a public utility engaged in the distribution of gas throughout the southern half of California, had installed pipelines in Martel and Vista Streets located in the County of Los Angeles outside of any municipal corporation pursuant to a franchise granted to Petitioner by the County Board of Supervisors on April 2, 1917 [Ex. J, R. 40-44]. Respondent City obtained its right to install a sewer in the same streets from the same County Board on December 1, 1953 [R. 45-46].

The City had no power to install sewers in county streets except thusly by grant from the County. *California Public Utilities Code*, Section 10101 *et seq.* By virtue of this grant by the County Board, the City then became possessed of a franchise similar and equal to that of Petitioner, according to established State law. *California v. Marin Municipal Water District*, 17 Cal. 2d 699, 111 P. 2d 651 (1942). Both grants by the County Board were subject to the condition that permits be obtained by the franchisees before actual construction be commenced [Ex. K, R. 45-46, par. 2, and Ex. J, R. 41, par. 12].

For the privilege for installing and maintaining its pipes in county streets, Petitioner agreed to and does pay the County two per cent of the gross receipts collected by it in County territory [Ex. J, R. 42, par. 17]. Petitioner's franchise imposed only one obligation on the Petitioner to relocate its pipelines, namely, when necessitated by a change in the grade of the streets [Ex. J, R. 41, par. 8]. Nevertheless, Respondent City of Los Angeles, proceed-

ing to install its sewer beneath county streets outside its own territorial limits pursuant to its franchise from the County, demanded that Petitioner relocate its gas lines at its own expense to make way for the City's installation [Ex. C, R. 22].

Petitioner agreed to relocate but demanded its relocation costs, contending that under its franchise with the County of Los Angeles it had a vested right in the street and was under no obligation to relocate its pipes at its own expense except as provided in its franchise and thus was under no such obligation to make way for Respondent City's extraterritorial improvement [Ex. D, R. 23]. Since the parties were deadlocked on the issue, and in order not to delay Respondent's construction schedule, Petitioner agreed to relocate its lines first and later seek judicial determination of its right to be compensated therefor [Ex. G, R. 27]. Petitioner's timely claim was rejected [Ex. H, R. 28], and Petitioner commenced this action to recover its costs.

Petitioner has asserted a taking of its property without due process and just compensation in violation of the Fourteenth Amendment in every court below. In the trial court, Petitioner alleged that "the taking, damaging and appropriation of plaintiff's said property without payment of just compensation therefor was and is without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States . . ." [R. 14, lines 26-31]. Judgment in the trial court was for Petitioner gas company [R. 49].

The District Court of Appeal, in unanimously affirming the judgment of the trial court, upheld Petitioner's vested rights [App. A, p. 3, and Clk. Tr.]:

> "Such a property right is vested, and neither the state nor any of its agencies may under the police power take it for constructing sewers without paying just compensation for it" . . . . (citing cases).
>
> "That a franchise is a property right protected by the federal constitution" (Citing cases).

The Supreme Court of California in reversing stated [App. B, pp. 5, 6, and Clk. Tr.]:

> "It is not disputed that this franchise constitutes a contract secured by the United States Constitution against impairment by subsequent state legislation and that the company's rights thereunder can not be taken or damaged for public use without making just compensation. Accordingly it is necessary to determine what those rights are." (Citations omitted.)

Then the Court proceeded to hold that property of Petitioner and its rights granted by the county franchise had not been taken or damaged in deprivation of rights guaranteed by the Fourteenth Amendment.

With such conflict of constitutional interpretation affecting the whole great problem of rights in the subsurface, Petitioner seeks a review in this Court.

Reasons for Granting Writ.

1. The Decision Below Creates an Unanswered Problem of National Importance as to Conflicting Rights to the Use and Occupancy of Underground Space for Service Facilities in Congested Population Centers.

Underground space in our urban centers is at such a premium as to require a decision of this Court to ascertain the respective rights of public utilities and governmental agencies, or whether the former must forever and always yield to the latter at their own expense.

The decision below, if allowed to stand, can only mean that any political subdivision of the State, of which there are literally thousands, can embark upon some public construction and evict prior occupants of substreet space to make way for such improvement without any of the established processes of the law and constitutional demands of just compensation. To put it another way, the substance of the decision below is that a facility of any public utility installed under public franchise has no protection in the situs in which it is installed but is forever subject to forced removal to accommodate subsequent installations by any and all public agencies. This would be true whether the political subdivision were acting a mile outside of its borders or presumably a hundred miles.

Such decision can only lead to choas in the allocation of subterranean space. Each public agency in turn can thus order all prior substructures to get out of the way for its new improvement. This could be done, if the decision be correct, whether or not the political subdivision has jurisdiction over the street where the facility is installed. In the instant case, the City had none. For all practical purposes the decision asserts that any local political agency has paramount rights over any public

utility anywhere such agency chooses to install an improvement.

The surfaces of streets are used for the movement of vehicles and pedestrians, but in urban centers the area beneath the surface of streets is used for the installation of underground facilities, *e.g.*, gas, water, petroleum and sewer lines, storm drains, subways, railways, electrical communications and transmission systems. In crowded cities, this secondary use has become as important and necessary as the primary use of streets for locomotion.

Underground facilities are so important to our urban population that without them our cities and urban centers simply could not function.[1] If these facilities were installed on the surface of city streets, or if vehicles were substituted to transport sewage, water, etc., over the surface of the public streets, the interference with traffic and the traffic control problems which would result would be so great as to be prohibitive. For example, if telephone lines were evicted from subsurface space and strung on poles above the streets in the City of New York, they "would average 8,375 to the block and it is doubtful wherther pigeons could find space in which to fly."[2] If water to supply the needs of the City of Los Angeles were transported by truck, it is estimated that several thousand tank trucks operating twenty-four hours per day would be needed to carry this water, which is now carried by underground pipes.[3]

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[1]"Subsurface Traffic Interference," Los Angeles Substructure Committee (1952), p. 3. See also "Coordinating Subsurface Utility Installations," Public Works, June, 1956.

[2]Abrams, *New York Underground*, 61 Public Utilities Fortnightly 729.

[3]Subsurface Traffic Interference, *supra*, p. 3.

Urban societies of the future will demand even greater service than at present, and it is apparent that facilities for such service must go underground. To provide such service without interference with already overcrowded surface traffic will burden the substructure of our cities almost more than imagination can encompass.

The premium thus placed on underground space under city streets makes it important that this Court review the decision below that utility facilities installed underground enjoy none of the protections accorded other property rights by the constitutional requirements of due process and just compensation.

2. The Decision Below Unconstitutionally Assesses Customers of a Public Utility to Pay Relocation Costs for a Purely Local Improvement Without Any Benefit Therefrom.

Petitioner maintains a network of service facilities supplying gas to customers throughout the entire southern half of California. Respondent's sewer is for the benefit of residents in one section of the City of Los Angeles. Relocation of Petitioner's gas lines to make way for the City's sewer is part of the cost and expense of the improvement. To the extent that a public utility must pay the cost of relocating its lines to make way for the new installation, it is paying that much toward its cost. Certainly, no benefit from the sewer accrues to the public utility or its customers.

It is axiomatic that any increase in the cost borne by a public utility must be recognized and reflected in an increase in its rates to its consumers.

Western Light & Telephone Company, Inc., 10 P. U. R. 3d 70, 76-80 (Mo. P. S. C., 1955);

Re Cortez National Gas Company, Inc., 14 P. U. R. 3d 105, 107-108 (Colo. P. U. C., 1956).

Thus, the decision by the Court below means that residents of all of the other municipalities and even remote counties of Southern California served by Petitioner will be required to pay a part of the cost of installing the City's sewer. Residents of the City of Los Angeles will receive the benefit of the sewer, but gas consumers of half the state who receive no such benefit will help to pay for it.

Thus, what the Respondent has done in effect is to lay an indirect tax on all of Petitioner's customers, regardless of where they live, for part of the cost of construction of this sewer. If Respondent had attempted to tax Petitioner's customers who receive none of its benefits directly to raise funds to pay for the sewer and the relocation of Petitioner's pipes therefor, such tax would be a taking of property without due process of law. To assess such a tax Respondent must assert such power in relation to protection which it has afforded or to benefits which it has conferred upon those customers of Petitioner not residing within Respondent's city limits. *State of Wisconsin v. J. C. Penney Co.*, 311 U. S. 435, 444, 61 S. Ct. 246, 85 L. Ed. 267 (1940); *Gast Realty & Investment Company v. Schneider Granite Co.*, 240 U. S. 55, 36 S. Ct. 254, 60 L. Ed. 523 (1916).

3. Lower Courts and Legislatures Are in Doubt as to Respective Rights and Duties of Public Utilities and Governmental Agencies as to Compensation for Required Relocations.

Petitioner does not question the right of another public utility or governmental agency, such as Respondent, to share the already overcrowded space beneath the surface of public streets for the installation of necessary new facilities. All Petitioner asserts here is that those agencies

installing new service facilities underground respect constitutional requirements of just compensation with respect to pre-existing installations.

The issues arising here are arising every working day in every metropolitan community in the United States. There are now pending at various stages innumerable lawsuits between utilities and governmental agencies involving this question of who shall bear the cost of relocation of prior lines for subsequent installations. The multiplicity of litigation to a large degree reflects the fact that there is no decision of this Court which, recognizing the scope of the problem, establishes applicable constitutional principles and announces the rights of respective parties in subterranean space.

Likewise, the Congress and the various legislatures are in the dark. Witness the new mammoth *Federal Aid Highway Act of 1956* where the Congress authorized compensation to public utilities for necessary relocations to accommodate the huge federal superhighway system. but such authority is ambiguously conditioned by this language of the Act:

> "Provided, That Federal funds shall not be apportioned to the States under this section when the payment to the utility violates the law of the State or violates a legal contract between the utility and the State."
>
> Federal Aid Highway Act of June 29, 1956 (70 Stat. 374), Section 111(a).

A stateside illustration of legislative confusion on this issue is found where the California Legislature required a flood control district to compensate public utilities for relocations of their lines "in the manner and to the extent

required by the Constitution of the United States and the Constitution of California."

Deering's Water Code, Act 4463, Sec. 16, p. 349.

There are, it is true, a number of older cases decided by this Court which deal with the general question involved herein.

Chicago v. Sheldon, 9 Wall. (U. S.) 50, 19 L. Ed. 594 (1870);

New Orleans Gas Light Co. v. Drainage Commission, 197 U. S. 453, 25 S. Ct. 471, 49 L. Ed. 831 (1905);

Chicago B. & Q. Railway Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 (1897);

Chicago B. & Q. Railway v. Drainage Commission, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596 (1906);

Lake Shore Ry. Co. v. Clough, 242 U. S. 375, 37 S. Ct. 144, 61 L. Ed. 374 (1917);

Panhandle Eastern Pipeline Co. v. State Highway Commission, 294 U. S. 613, 55 S. Ct. 563, 79 L. Ed. 1090 (1935).

But these cases and a few others of this Court are readily distinguishable and do not well apply to the great congestion of substructures resulting from this century's change from a rural to city population. For example, the *Sheldon* case is interpreted by public utilities as prohibiting a governmental agency from requiring a utility to pay costs required by some activity of a governmental agency where there is no provision in the franchise obligating the utility to pay such costs. The governmental agencies argue that the past conduct of the parties rather than the language of the franchise controlled the Court's decision in the *Sheldon* case (*e.g.* see decision below, App. B, at p. 12).

Governmental agencies rely on the *New Orleans* case, *supra*, and the railroad relocation cases, *Chicago B. & Q. Railway v. Drainage Commission*, *Chicago B. & Q. Railway Co. v. Chicago and Lake Shore Ry. Co. v. Clough*, all *supra*, as authority for the proposition that utilities must relocate their underground facilities without compensation to make way for subsequent facilities to be installed by governmental agencies. The utilities argue that the railroad relocation cases turn upon special facts applicable to surface crossings and are, therefore, police power cases and inapplicable to the relocation of underground facilities. The operation of the railroads on the surface of public streets poses dangers to the traveling public, so that railroads are subject to police power and in locating their rails in public streets do so on an implied obligation to relocate their tracks if such relocation is reasonably necessary to protect the traveling public. Similarly, railroads which locate their facilities in natural drainage channels do so upon an implied obligation that they will relocate their lines to make way for improvements of the channel.

This Court has so construed the railroad cases and the *New Orleans* case in *Panhandle Eastern Pipeline Co. v. State Highway Commission*, 294 U. S. 613, 620, 55 S. Ct. 563, 79 L. Ed. 1090 (1935).

Governmental agencies believe that the *New Orleans* case, *supra*, gives then an unlimited right to require utilities to relocate their installations for any subsequent underground installation made by governmental agencies, regardless of the terms and conditions of the franchise under which the utilities installed their facilities beneath the surface of the public streets. The utilities argue that the *New Orleans* case, *supra*, is limited to its unique facts and indeed turns upon the fact that the franchise contained

no relocation clause at all, in which event the Court held a relocation obligation would be implied. This is made clear in the *Panhandle* case, *supra*, at page 622 of 294 U. S., where the Court said,

> "*New Orleans Gas Light Co. v. Drainage Commission*, 197 U. S. 453, 25 S. Ct. 471, 49 L. Ed. 831, and similar cases concerning pipes in public streets, are not controlling. In them the pipes were laid upon agreement, actual or implied, that the owner would make reasonable changes when directed by the municipality."

The confusion between the positions taken by the public utilities and by governmental agencies is well illustrated by the fact that of the eleven judges who have considered the present case, six have been of the opinion that the Petitioner is entitled to be recompensed for its relocation costs, while five have concluded that Petitioner must relocate at its own expense [Appendices A and B, and Clk. Tr.].

Thus, the question here is of importance to all public utilities and governmental agencies which have installed and which in the future will install facilities beneath the surface of public streets. The number of the disputes between the public utilities and governmental agencies as to who must bear the cost of relocation in cases such as this one will be greatly reduced if this Court will review the present case and announce the principles of constitutional law applicable to the question raised.

4. The Effect of the Decision Below Is That a Service Installed Under Franchise Has No Vested Protection From Subsequent Encroachment by a Public Agency.

Petitioner's franchise contains an express clause providing that Petitioner shall relocate its pipes for a change of grade of the streets [Ex. J, R. 41, par. 8]. Relocation by Petitioner of its pipes to make way for facilities

other than streets is not included in the relocation clause and is not a condition of the Petitioner's franchise. To force the Petitioner to relocate its pipes for the subsequent installation of other underground facilities is to impose upon Petitioner's franchise other and more onerous burdens for which it did not bargain. Such imposition of other and more onerous conditions on Petitioner's franchise, even if imposed by the grantor of the franchise, the County of Los Angeles, would amount to a taking of Petitioner's property without due process of law.

City of St. Louis v. Western Union Telephone Company, 148 U. S. 92, 13 S. Ct. 485, 37 L. Ed. 380 (1893);

Russell v. Sebastian, 233 U. S. 195, 34 S. Ct. 517, 58 L. Ed. 912, L. R. A. 1918E 882 (1914);

City of Los Angeles v. Los Angeles Gas and Electrical Corp., 251 U. S. 32, 40 S. Ct. 76, 64 L. Ed. 121 (1919);

Chicago v. Sheldon, 9 Wall. (U. S.) 50, 19 L. Ed. 594 (1870);

State Ex rel. City of Kansas v. Corrigan Consolidated Street Railway Co., 85 Mo. 263, 55 Am. Rep. 361 (1884);

City of Kansas v. Corrigan, 86 Mo. 67 (1885);

Western Union Telephone Co. v. Police Jury, 225 La. 531, 73 So. 2d 450 (1954).

A fortiori, a separate governmental subdivision, *not* a party to the franchise, cannot impose other and more onerous conditions upon Petitioner's franchise without being guilty of taking Petitioner's property without due process of law. This is just what the Respondent City has done. The Court below paid lip service to Petitioner's

constitutional rights as pronounced by this Court, but then proceeded to hold that Petitioner has none.

One of the reasons set forth in the opinion of the Court below as the basis of its decision is that the franchise does not provide that Petitioner is to be compensated for relocation costs and that, therefore, the Petitioner has no right to such compensation (App. B, p. 11). This conclusion of the Court below is erroneous, for it is the Constitution of the United States and *not* the language of the franchise which entitles Petitioner to recover just compensation when its property is taken by a governmental agency without due process of law.

Russell v. Sebastian, 233 U. S. 195, 34 S. Ct. 517, 58 L. Ed. 912, L. R. A. 1918E 882 (1914);

Monongahela Navigation Company v. United States, 148 U. S. 312, 13 S. Ct. 622, 37 L. Ed. 463 (1893).

Conclusion.

For the foregoing reasons, Petitioner submits that this Court should issue its writ of certiorari to the Supreme Court of California.

Respectfully submitted,

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APPENDIX "A."

Opinion of the District Court of Appeal.

In the District Court of Appeal of the State of California, Second Appellate District, Division One.

Southern California Gas Company, a corporation, Plaintiff and Respondent, vs. City of Los Angeles, a municipal corporation, Defendant and Appellant.

Appeal from a judgment of the Superior Court of Los Angeles County, Philbrick McCoy, Judge.

For Appellant: Roger Arnebergh, City Attorney; Bourke Jones, Assistant City Attorney; Claude E. Hilker, Deputy City Attorney.

For Respondent: Bates Booth. Civil No. 22389.

Filed Dec. 9, 1957.

The facts in this case are without conflict.

To keep up with its enormous growth of population, the City of Los Angeles was compelled to construct new sewer lines to serve a part of the city located in the San Fernando Valley. One of these lines runs to a juncture with the city's Hyperion disposal line, and goes through a narrow strip of land in West Hollywood. This strip is within the county of Los Angeles, and is often called the "County Strip."

Part of this sewer line was routed under streets in the county strip that were already occupied by gas lines of Southern California Gas Company, a public utility corporation, and put there under a franchise from the county. These gas lines were in the way of the projected sewer line, and had to be relocated.

The gas company contended that the city should pay the cost of the relocation. The city would not agree to this. So the gas company relocated its lines, and brought

this action in the superior court against the city for $12,003.92, the cost of the work.

Judgment was for the gas company, and the city appeals.

Thus we have for decision a single question, as stated in the city's opening brief on appeal: "Is a public utility obligated to relocate at its own expense its facilities underlying public streets within an unincorporated portion of the county to make way for a public improvement being installed therein by a city?"

The city contends:

1. That the installation and maintenance of sewers by a municipality for the protection of the public health is an exercise of the police power.

2. The use by a public utility of public streets is subservient to the public use thereof, and a public utility must at its own expense relocate its facilities therein to avoid conflict with such public use.

3. The police power of the state is being exercised by a municipality when it constructs sewers beyond its boundaries and a utility must relocate its interfering lines in public streets at its own expense.

4. The state's authority over the public streets is a proper basis for its grant of authority to municipalities to install sewers therein.

The state's police power to take its citizens' property without paying for it is always qualified by its constitutional obligation to pay just compensation for it. (Cal. Const., Art. I, sec. 14.)

Of course, under the police power, in emergencies calling for immediate action, when conditions dangerous to life, health, or property of the people are present, the state may take or destroy private property without compensa-

tion. Private property is then subservient to the right of the state to act in the public interest. But this power is never permitted to go beyond proper bounds, and when it does it comes within the purview of eminent domain. (*Cf.* House v. L.A. County Flood Control Dist., 25 Cal. 2d 384, 388.)

In our opinion, constructing sewers in the ordinary growth of cities does not come within the emergency scope of the police power, that would permit taking of private property without compensation for it.

The gas company's property here in question is "a species of real property appropriately designated as a franchise." (South Pasadena v. Pasadena Land etc. Co., 152 Cal. 579, 586.)

Such a property right is vested, and neither the state nor any of its agencies may under the police power take it for constructing sewers without paying just compensation for it. (Western Union Tel. Co. v. Hopkins, 160 Cal. 106, 120; Archer v. City of Los Angeles, 19 Cal. 2d 19; Rose v. State of California, 19 Cal. 2d 713; County of L.A. v. Southern Cal. Tel. Co., 32 Cal. 2d 378; Los Angeles v. Los Angeles Gas & E. Corp., 251 U.S. 32.)

Industry of counsel has brought to us cases from out of state which hold both ways, *i.e.*—

That the public utility must move its lines at its own expense:

New Orleans Gaslight Co. v. Drainage Commission of N.O., 197 U.S. 453; Anderson v. Fuller (Fla.) 41 So. 684; Transit Commission v. Long Island R. Co., 253 N.Y. 345, 171 N.E. 565.

That a franchise is a property right protected by the federal constitution:

Russell v. Sebastian, 233 U.S. 195; Panhandle E. Pipe Line Co. v. State Highway Com., 294 U.S. 613. (Distinguishing New Orleans Gaslight Co. v. Drainage Commission of N.O., *supra*, 197 U.S. 453.)

This court concludes that the decision of the superior court was right, not only as a matter of law, but also as a practical matter. As one looks into the future and sees the continuing growth of population of California, with its cities forced to extend their facilities in many directions and for long distances, it would seem only fair that public utility companies whose properties may be in the way of such extensions should be compensated for their relocation. Seeking, as we should, for the ultimate justice in this case, it is to be said that, in the last analysis either the people of the City of Los Angeles or the people served by the gas company will have to pay this expense. Quite likely in this case it will be mostly the same people who will contribute their share through one agency or the other. But it will be the people of the city who will enjoy the benefits of this public work, and they should, therefore, bear the burden of its cost.

There is nothing in the case of Merced Falls Gas. etc. Co. v. Turner, 2 Cal. App. 720 that is contrary to this conclusion.

In that case it was held that a public utility franchise did not grant an absolute, indefeasible right in particular spots of earth where its poles were placed originally; that the right to maintain them was subject always to changing conditions.

The judgment is affirmed.

DRAPEAU, *J. pro tem.*

We concur:

WHITE, *P. J.*

FOURT, *J.*

APPENDIX "B."

Opinion of the Supreme Court of the State of California.

In the Supreme Court of the State of California. In Bank.

Southern California Gas Company, a corporation, Plaintiff and Respondent, vs. City of Los Angeles, a municipal corporation, Defendant and Appellant. L. A. 24909.

Filed Aug. 29, 1958.

TRAYNOR, *J.*—The city of Los Angeles constructed the La Cienega and San Fernando Relief Sewer as part of a sewer construction program. A short section of this sewer line passes under a narrow strip of land known as the County Strip located outside the city limits in an unincorporated area of the county of Los Angeles. To construct the sewer it was necessary to relocate gas lines of the Southern California Gas Company. The company agreed to relocate its gas lines in the County Strip subject to a later determination of its obligation to do so at its own expense. It conceded its obligation to relocate its lines at its own expense within the city limits but denied that it had the same obligation with respect to its lines located in the County Strip. After the work was completed it brought this action against the city to recover the costs incurred in relocating its County Strip lines and recovered judgment for $12,003.92 plus interest. The city appeals.

The company located its lines in the county pursuant to a county franchise. It is not disputed that this franchise constitutes a contract secured by the United States Constitution against impairment by subsequent state legislation (see County of Los Angeles v. Southern Cal. Tel. Co., 32 Cal. 2d 378, 382 [196 P. 2d 773]) and that the company's

rights thereunder can not be taken or damaged for public use without making just compensation. (Cal. Const., art. I, §14; U. S. Const., Amend. 14, §1; Russell v. Sebastian, 233 U. S. 195 [34 S. Ct. 517, 58 L. Ed. 912, L. R. A. 1918E 882]; United States v. Brooklyn Union Gas Co., 168 F. 2d 391, 394; City of Petaluma v. Pacific Tel. & Tel. Co., 44 Cal. 2d 284, 288 [282 P. 2d 43].) Accordingly it is necessary to determine what those rights are.

In the absence of a provision to the contrary it has generally been held that a public utility accepts franchise rights in public streets subject to an implied obligation to relocate its facilities therein at its own expense when necessary to make way for a proper governmental use of the streets. (New Orleans Gaslight Co. v. Drainage Com., 197 U. S. 453, 461-462 [25 S. Ct. 471, 49 L. Ed. 831]; Chicago B. & Q. Railway v. Illinois, 200 U. S. 561, 586 [26 S. Ct. 341, 50 L. Ed. 596]; Transit Comm. v. Long Island R. Co., 253 N. Y. 345 [171 N. E. 565, 566]; Southern Bell Tel. & Tel. Co. v. Commonwealth, — Ky. — [266 S. W. 2d 308, 310]; Southern Bell Tel. & Tel. Co. v. State (Fla.), 75 So. 2d 796, 800; Western Gas Co. of Washington v. City of Bremerton, 21 Wn. 2d 907 [153 P. 2d 846, 847]; *In re* Delaware River Joint Com., 342 Pa. 119 [19 A. 2d 278, 280]; Natick Gaslight Co. v. Inhabitants of Natick, 175 Mass. 246 [56 N. E. 292, 293]; Opinion of the Justices, — Me. — [132 A. 2d 440, 443]; Opinion of the Justices, — N. H. — [132 A. 2d 613, 614]:) The laying of sewers is a governmental as distinct from a proprietary function under the foregoing rule. (Detroit Edison Co. v. City of Detroit, 332 Mich. 348 [51 N. W. 2d 245, 247-248]; Louisville Gas & Electric Co. v. Commissioners of Sewerage of Louisville, 236 Ky. 376 [33 S. W. 2d 344, 344-345]; Nicholas Di Menna & Sons v. City of New York, 114 N. Y. S. 2d 347, 350;

Portland Gas & Coke Co. v. Giebisch, 84 Ore. 632 [165 P. 1004, L. R. A. 1917E 1092]; City of San Antonio v. San Antonio St. Ry. Co., 15 Tex. Civ. App. 1 [39 S. W. 136, 138]; Anderson v. Fuller, 51 Fla. 380 [41 So. 684, 688, 120 Am. St. Rep. 170, 6 L. R. A. N. S. 1026]; National Water-Works Co. v. City of Kansas, 28 F. 921, 922-923; *cf.* City of Los Angeles v. Los Angeles Gas & Elec. Corp., 251 U. S. 32, 39-40 [40 S. Ct. 76, 64 L. Ed. 121]; State *ex rel.* Speeth v. Carney, 163 Ohio St. 159 [126 N. E. 2d 449, 460]; Postal Tel.-Cable Co. v. City & County of San Francisco, 53 Cal. App. 188, 192-193 [199 P. 1108].) Panhandle etc. Co. v. State Highway Com., 294 U. S. 613 [55 S. Ct. 563, 79 L. Ed. 1090], is not to the contrary, for in that case the utility's private right of way was involved, not its right to use the public streets.

The company contends, however, that any implied obligations in its county franchise to relocate its pipes cannot be invoked for the benefit of the city operating outside its territorial limits. We cannot agree with this contention. Such obligations rest on the paramount right of the people as a whole to use the public streets wherever located, and the fact that a franchise is granted by one political subdivision as an agent of the state (see San Francisco-Oakland Terminal Rys. v. County of Alameda, 66 Cal. App. 77, 83 [225 P. 304]; Belfast Water Co. v. City of Belfast, 92 Me. 52 [42 A. 235, 237]) does not defeat the right of another such agent acting in its governmental capacity to invoke the public right for the public benefit. (First Nat. Bank of Boston v. Main Turnpike Auth., 153 Maine 131 [136 A. 2d 699, 711]; City of San Antonio v. Bexar Metropolitan W. Dist., (Tex. Civ. App.), 309 S. W. 2d 491, 493; Cummins v. City of Seymour, 71 Ind. 491 [41 Am. Rep. 618, 623-625]; New Orleans Gaslight Co.

v. Drainage Com., 111 La. 838 [35 So. 929, 933]; see Gadd v. McQuire, 69 Cal. App. 347, 358-359 [231 P. 2d 754].) The fact that the city's use of county streets for its sewers is authorized by section 10101 of the Public Utilities Code has no bearing on the applicability of the foregoing rule. It is true that the rights granted to municipal corporations by that section have been held to constitute franchises subject to the paramount right of the state to make the streets safe for public travel (State v. Marin Mun. W. Dist., 17 Cal. 2d 699, 703-704 [111 P. 2d 651]); but it does not follow that a franchise exercised by a city in its governmental capacity under that section is subordinate to a prior franchise granted to a public utility. The utility involved in the Marin case was a municipal water district operating in a proprietary capacity. (See City of South Pasadena v. Pasadena Land etc. Co., 152 Cal. 579, 592-593 [93 P. 490].) In the present case, on the other hand, the city is exercising one of its most important governmental powers, a power so important that it is one of the few powers it may exercise outside of its territorial limits without express authorization. (Harden v. Superior Court, 44 Cal. 2d 630, 638-639 [284 P. 2d 9]; Mulville v. City of San Diego, 183 Cal. 734, 737 [192 P. 702]; McBean v. City of Fresno, 112 Cal. 159, 163 [44 P. 358, 53 Am. St. Rep. 191, 31 L. R. A. 794]; see also City of National City v. Fritz, 33 Cal. 2d 635, 637 [204 P. 2d 7]; City of Madera v. Black, 181 Cal. 306, 312-313 [184 P. 397].) The Marin case itself recognized and applied the established rule that a utility's rights in the public streets are taken subject to the paramount right of public travel, and as stated above, the same rule applies between public utilities and municipal corporations using the streets for sewer purposes.

The company contends, however, that the express terms of its county franchise define its obligation to relocate its lines at its own expense and that by clear implication any other similar obligations are excluded. Section 8 of its franchise provides that "the County of Los Angeles reserves the right to change the grade of any highway over which this franchise is granted, and the grantee of said franchise, its successors or assigns, shall at once change the location of all pipes and other appliances laid hereunder to conform to such change of grade." The city contends that the recital of the obligation to relocate the gas lines for changes of grade does not exclude other implied obligations to relocate lines and that any attempt to relieve the company of such obligations would be invalid.

The right of municipal corporations to require utilities to relocate their lines to make way for governmental uses of the streets has usually been described as resting in the police power, and it has frequently been stated in this context that the police power cannot be bargained away. (National Water-Works Co. v. City of Kansas, 28 F. 921, 922-923; City of Macon v. Southern Bell Tel. & Tel. Co., 89 Ga. App. 252 [79 S. E. 2d 265, 275]; Belfast Water Co. v. City of Belfast, 92 Maine 52 [42 A. 235, 237]; Louisville City Ry. Co. v. City of Louisville, 71 Ky. (8 Bush) 415, 422-423; Scranton Gas & Water Co. v. City of Scranton, 214 Pa. 586 [64 A. 84, 85, 6 L. R. A. N. S. 1033]; Louisville Gas & Electric Co. v. Commissioners of Sewerage of Louisville, 236 Ky. 376 [33 S. W. 2d 344, 344-345]; see New Orleans Gaslight Co. v. Drainage Com., 197 U. S. 453, 460 [25 S. Ct. 471, 49 L. Ed. 831].) Given, however, the municipal power to vacate streets or acquire a lesser interest in them in the first instance than is usually obtained by the public (see Pennsylvania Coal

Co. v. Mahon, 260 U. S. 393, 416 [43 S. Ct. 158, 67 L. Ed. 322, 28 A. L. R. 1321]; Detroit Edison Co. v. City of Detroit, 332 Mich. 348 [51 N. W. 2d 245, 247-248]), there would appear to be no basic principle that would prohibit granting a utility a right to compensation for relocating its lines as part of its franchise although such right would not otherwise pass. This view finds support in cases holding that the Legislature may provide for such compensation. (*In re* Gillen Place, Borough of Brooklyn, 304 N. Y. 215 [106 N. E. 2d 897, 900]; Baltimore Gas & Electric Co. v. State Roads Com., 214 Md. 266 [134 A. 2d 312, 315]; Philadelphia Sub. W. Co. v. Pennsylvania P. U. Com., 168 Pa. Super. 360 [78 A. 2d 46, 51-52]; Opinion of the Justices, — Me. — [132 A. 2d 440, 443]; Opinion of the Justices, — N. H. — [132 A. 2d 613, 614-615]; see Columbus Gaslight & Coke Co. v. City of Columbus, 50 Ohio St. 65 [33 N. E. 292, 293, 40 Am. St. Rep. 648, 19 L. R. A. 510].)* Perhaps this apparent conflict can be reconciled on the theory that a state Legislature may authorize franchises granting the utility the right to compensation for relocating its lines to make way for governmental uses, but that it will not be held to have delegated such power to a political subdivision in the absence of express language to that effect. It is unnecessary to determine, however, whether the county was empowered to grant a franchise including the right to the compensation here sought, for we have concluded that properly interpreted the company's franchise included no such right.

As a public grant the franchise is to be construed in favor of the public interest. (Knoxville Water Co. v.

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*It should be noted that we are not here concerned with the question of the power of the Legislature to grant additional rights under a franchise after it has been accepted by the utility and the problem that would be raised thereby of a possible gift of public funds.

Knoxville, 200 U. S. 22, 33-34 [26 S. Ct. 224, 50 L. Ed. 353]; County of Los Angeles v. Southern Cal. Tel. Co., 32 Cal. 2d 378, 384 [196 P. 2d 773]; City of Sacramento v. Pacific Gas & Electric Co., 173 Cal. 787, 791 [161 P. 978]; Civ. Code §1069.) Its own terms provide that it "is hereby granted upon each and every condition herein contained, and shall ever be strictly construed against the grantee and its successors and assigns. Nothing shall pass hereby unless it be granted in plain and unambiguous terms." The maxim *expressio unius exclusio alterius est* cannot be invoked to make plain and unambiguous the right to compensation that the company seeks. Given the parties' express recognition of the rule of strict construction against the grantee, paragraph 8 cannot reasonably be interpreted as being more than a partial expression of the parties' common-law rights and obligations (City of Los Angeles v. City of Glendale, 23 Cal. 2d 68, 77 [142 P. 2d 289]; Strand Improvement Co. v. City of Long Beach, 173 Cal. 765, 772-773 [161 P. 975]) inserted out of an abundance of caution or by way of example only. (City of Lexington v. Commercial Bank, 130 Mo. App. 687 [108 S. W. 1095, 1096]; Georgia Power Co. v. Leonard, 187 Ga. 608 [1 S. E. 2d 579, 581]; see also Springer v. Philippine Islands, 277 U. S. 189, 206 [48 S. Ct. 480, 72 L. Ed. 845]; Dickey v. Raisin Proration Zone No. 1, 24 Cal. 2d 796, 811 [151 P. 2d 505, 157 A. L. R. 324].) Thus, the New York Court of Appeals has pointed out that despite the existence of express provisions dealing with the utility's obligations with respect to the streets "The reasonable construction . . . is to assume that the people are not to be burdened with any heavier expense than necessity requires, and that to relieve the public service corporations having franchises in the streets of their com-

mon-law liabilities and to pass them over to the taxpayer can only be accomplished by the express direction of the Legislature." (Transit Commission v. Long Island R. Co., 253 N. Y. 345 [171 N. E. 565, 568]; see also New York Tunnel Authority v. Consolidated Edison Co., 295 N. Y. 467 [68 N. E. 2d 445, 448-449].) Chicago v. Sheldon, 9 Wall. (U. S.) 50 [19 L. Ed. 594], State *ex rel.* City of Kansas v. Corrigan Consol. Street Ry. Co., 85 Mo. 263 [55 Am. Rep. 361]; City of Kansas v. Corrigan, 86 Mo. 67, and Western Union Tel. Co. v. Police Jury, 225 La. 531 [73 So. 2d 450], are not to the contrary. The first three of these cases involved, not competing uses of the streets, but the extent of the utility's duty to repair and repave the streets, a matter covered by the express terms of the franchise, and in the Sheldon case the court's interpretation was in accord with the practical construction placed on the franchise by the parties. In the fourth case, the competing public use was so highly unusual that it could not have been contemplated at the time the franchise was accepted. In the present case, on the contrary, the use of the streets for sewers was clearly to be anticipated, the utility's common-law obligation to relocate its pipes to acommodate that use has at all times been clearly recognized by the law, and there is no provision in the company's franchise abrogating that obligation by giving it the right to recover the costs of such relocation.

The judgment is reversed with directions to the trial court to enter judgment for the defendant city.

GIBSON, *C. J.*, SHENK, *J.*, and SPENCE, *J.*, concurred.

CARTER, *J.*, Concurring.—Although I agree with the conclusion reached in the opinion prepared by Mr. Justice Traynor, for the reasons hereinafter stated, I regret my inability to join in said opinion.

My views with respect to the application of article I, section 14, of the Constitution of California to the ordinary situation in which private property has been taken or damaged for a public use, have been stated many times in both majority, dissenting and concurring opinions which I have written as a member of this court (Rose v. State, 19 Cal. 2d 713 [123 P. 2d 505]; Bacich v. Board of Control, 23 Cal. 2d 343 [144 P. 2d 818]; Archer v. City of Los Angeles, 19 Cal. 2d 19, 29 [119 P. 2d 1]; O'Hara v. Los Angeles County Flood etc. Dist., 19 Cal. 2d 61, 64 [119 P. 2d 23]; House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384, 398 [153 P. 2d 950]; Clement v. State Reclamation Board, 35 Cal. 2d 628, 646 [220 P. 2d 897]). It will be noted that in all of the cases above cited it was the position of the public agency which took the property or caused damage thereto, that the taking or damaging was done under the police power reserved to the state and its political subdivisions by article XI, section 11, of the Constitution of California. I did not agree with this contention, and my position in this regard is the same now as it was then. This is the first case since I have been a member of this court, in which, in my opinion, the police power doctrine was applicable to the facts of the case presented. A review of the above-cited cases reveals a state of confusion in the minds of some members of this court with respect to the situations in which the police power doctrine may be invoked by the state or a political subdivision thereof to take, damage or destroy private property without the payment of compensation therefor in

contravention of article I, section 14, of the Constitution of California. (See Rose v. State, *supra*; Bacich v. Board of Control, *supra*; Archer v. City of Los Angeles, *supra*; O'Hara v. Los Angeles County Flood etc. Dist., *supra*; House v. Los Angeles County Flood Control Dist., *supra*; Clement v. State Reclamation Board, *supra*; Beals v. City of Los Angeles, 23 Cal. 2d 381 [144 P. 2d 839]; People v. Ricciardi, 23 Cal. 2d 390 [144 P. 2d 799].) A reading of the last-cited cases including the dissenting and concurring opinions therein demonstrates the truth of my statement with respect to the confusion which has existed in the minds of some members of this court in attempting to distinguish cases involving the application of article I, section 14 (eminent domain), of the Constitution and cases involving the application of article XI, section 11 (police power), of the Constitution of California. The opinion prepared by Mr. Justice Traynor in this case adds to that confusion, as he fails to differentiate between the powers granted to the state and its political subdivisions under the last two cited constitutional provisions. Said opinion states: "In the present case, on the other hand the city is exercising one of its most important governmental powers, a power so important that it is one of the few powers it may exercise outside of its territorial limits without express authorization." He then cites Harden v. Superior Court, 44 Cal. 2d 630 [284 P. 2d 9], which is a case involving power of eminent domain. Later in his opinion, he states: "The right of mnuicipal corporations to require utilities to relocate their lines to make way for governmental uses of the streets has usually been described as resting in the police power, and it has frequently been stated in this context that the police power cannot be bargained away." The cases he cites here correctly apply the police power doctrine.

In said opinion, Mr. Justice Traynor also discusses the power of the Legislature to provide for the payment of compensation in cases such as this, but this proposition is not involved here because it is conceded that the Legislature made no such provision. This discussion is therefore obiter dictum.

There is really no need for the confusion which now exists in the decisions of this court which have had occasion to apply article I, section 14, and article XI, section 11, of the Constitution of California to particular factual situations as there is a clear distinction between the power of eminent domain and the police power granted by said constitutional provisions. It may be true that there is a twilight zone where the line of demarcation between the exercise of the power of eminent domain and the exercise of the police power is difficult to discern, but in view of the very clear pronouncements of the Supreme Court of the United States in this field, this is not such a case. I say this, notwithstanding my predilection to hold otherwise before reading the decisions of the Supreme Court of the United States applicable to the facts of this case. (New Orleans Gaslight Co. v. Drainage Com., 197 U. S. 453 [25 S. Ct. 471, 49 L. Ed. 831]; Chicago Burlington etc. R. R. Co. v. Chicago, 166 U. S. 226 [17 S. Ct. 581, 41 L. Ed. 979]; Chicago B. & O. Ry. Co. v. Illinois Commrs., 200 U. S. 561 [26 S. Ct. 341, 50 L. Ed. 596]; New York & N. E. Railroad Co. v. Bristol, 151 U. S. 556 [14 S. Ct. 437, 38 L. Ed. 269]; Butchers' Union etc. Co. v. Crescent City etc. Co., 111 U. S. 746 [4 S. Ct. 652, 28 L. Ed. 585]; Stone v. Mississippi, 101 U. S. 814 [25 L. Ed. 1079]; New Orleans Gaslight Co. v. Louisiana Light etc. Co., 115 U. S. 650, 671 [6 S. Ct. 252, 29 L. Ed. 516].) In view of these decisions, we have here a very simple case

which should be disposed of by an opinion free from the confusion and dictum which permeates many of the other decisions of this court in this field. For the sake of clarity only, I have prepared an opinion which correctly states and disposes of the issues in this case in accordance with the rules of law as declared by the Supreme Court of the United States to be applicable to the factual situation presented here.

Defendant, city of Los Angeles, a municipal corporation, appeals from a judgment awarding compensation to plaintiff, Southern California Gas Company, a corporation, for its costs in relocating its gas lines. The case was tried on an agreed statement of facts.

The city of Los Angeles, hereinafter referred to as the city, began a sewer construction program, one of the main parts of which was the construction of the "La Cienega and San Fernando Valley Relief Sewer." This sewer carries sewage from the San Fernando Valley to a spot near La Cienega Boulevard where it meets with the Hyperion disposal plant line. A small portion of this sewer line passes under a narrow strip of land known as the County Strip which is located outside the city limits but within an unincorporated area in the county of Los Angeles. A portion of the proposed sewer route underlying public streets in the County Strip was occupied by the gas lines of the Southern California Gas Company, hereinafter called the company. The company agreed to relocate its gas lines in the County Strip to make way for the sewer mains subject to a later determination of its obligation to do so at its own expense. The company conceded its obligation to relocate its lines at its own expense within the city limits but denied that it had the same obligation with respect to its lines located in the County Strip. Judg-

ment was rendered in favor of plaintiff company in the sum of $12,003.92, together with interest thereon at the rate of 7 per cent from March 25, 1955. The city appeals.

The city argues that a public utility, such as plaintiff, is obligated to relocate at its own expense its facilities underlying public streets within an unincorporated portion of the county to make way for a public improvement being installed therein by the city. The major points here involved are whether the installation and maintenance of sewers by a municipality for the protection of the public health is an exercise of the police power; whether the police power of the *state* is being exercised by a municipality when it constructs connecting sewers beyond its boundaries; and whether the relocation of gas lines, at the company's expense, constitutes a taking of private property without compensation within the meaning of the constitutional prohibitions.

There can be no doubt at this time but that the installation and maintenance of sewers in the interests of the public health by a municipality is an exercise of the police power. In Harter v. Barkley, 158 Cal. 742, 744, 745 [112 P. 556], it was held that "The regulation of the right of laying sewers in public streets is unquestionably a power conferred upon municipalities, partly by virtue of the provisions of section 11 of article XI of the constitution of California. The proper protection of the public health depends very largely upon the maintenance of a thorough and sanitary sewer system. . . . . It has been held, and we think very properly, that ordinances of a municipal corporation providing for the construction, maintenance, and repairs of sewers and rains are to be sustained as a valid exercise of police power." "Regulation by ordinance of methods and devices for the conveyance of sewage

from private dwellings in municipalities is recognized as an exercise of that branch of the police power which pertains to the public health. . . . ." (*In re* Nicholls, 74 Cal. App. 504, 507 [241 P. 399]; and see Sullivan v. City of Los Angeles, 116 Cal. App. 2d 807, 811 [254 P. 2d 590].)

The city contends that it is exercising the police power of the state when it constructs sewers beyond its boundaries and that it is authorized to do so by section 10101 of the Public Utilities Code and by its city charter. Section 10101, Public Utilities Code, provides: "There is granted to every municipal corporation of the State the right to construct, operate, and maintain water and gas pipes, mains and conduits, electric light and power lines, telephone and telegraph lines, sewers and sewer mains, all with the necessary appurtenances, across, along, in, under, over, or upon any road, street, alley, avenue, or highway, and across, under, or over any railway, canal, ditch, or flume which the route of such works intersects, crosses, or runs along, in such manner as to afford security for life and property."

The Los Angeles City Charter provides (§2(6)) that the city shall be empowered "To make and enforce within its limits all such local, police, sanitary, safety, welfare and other regulations as are not in conflict with general laws, and to exercise such jurisdiction *outside its limits* in such manner as may be authorized by law." (Emphasis added.)

In Mulville v. City of San Diego, 183 Cal. 734, 737 [192 P. 702], it was said: "In general, municipality is competent to act beyond its boundaries only in those cases in which it is so empowered by legislative authority and it is necessary, in passing upon the validity of acts of a municipality performed beyond its boundaries, to look to the

general laws and municipal charter for the requisite authority. In certain instances, owing to the urgency of extreme expediency or necessity, express authority is dispensed with and the power of the municipality to perform certain acts beyond its boundary is implied as incidental to the existence of other powers expressly granted. Thus it has been held that, where a municipality has power to construct sewers, it may, as an implied incident to such power, extend the same beyond its boundaries when necessary or manifestly desirable. (McBean v. City of Fresno, 112 Cal. 159 [53 Am. St. Rep. 191, 31 L. R. A. 794, 44 P. 358]; City of Coldwater v. Tucker, 36 Mich. 474; Cochran v. Village of Park Ridge, 138 Ill. 295 [27 N. E. 939]; 4 McQuillin on Municipal Corporations, sec. 1434.)" (Ebrite v. Crawford, 215 Cal. 724, 728-729 [12 P. 2d 937]; *In re* Blois, 179 Cal. 291, 295 [176 P. 449]; Raynor v. City of Arcata, 11 Cal. 2d 113, 120 [77 P. 2d 1054].) In *In re* Blois, 179 Cal. 291, 296 [176 P. 449], we said that we were "disposed to agree" and "to concede that municipalities may exercise certain extraterritorial powers when the possession and exercise of such powers are essential to the proper conduct of the affairs of the municipality. As for example, this court has held that a municipality has power to construct and maintain a system of waterworks outside of its boundaries for the supply of its inhabitants with water, and that it might even go to the extent of supplying water to persons living without the limits of such municipality. (South Pasadena v. Pasadena Land etc. Co., 152 Cal. 579, [93 P. 490].)"

It clearly appears that the city was exercising the police power of the state by express grant of power as set forth in section 10101 of the Public Utilities Code as augmented by the provisions of its own charter and, that even had there not been such an express grant of power, the au-

thority would be implied from the nature of the work undertaken under the police power. There can be no question but that it was imperative that the city's sewage disposal system connect with the Hyperion disposal plant and that such an exercise of the police power would have carried with it, by necessary implication, the power to act without its boundaries in making the connection. As we said in McBean v. City of Fresno, 112 Cal. 159, 163 [44 P. 358, 53 Am. St. Rep. 191, 31 L. R. A. 794], where disposition of the outfall of the sewage system outside the city limits was involved. "Proper sewers are in this day so essential to the hygiene and sanitation of a municipality that a court would not look to see whether a power to construct and maintain them had been granted by the charter, but rather only to see whether by possibility the power had been expressly denied."

The company contends that the city has neither a contractual right, nor the police power, to compel a utility to relocate its pipes without compensating the utility when both the pipes of the utility and the sewage system of the city are without the city limits. The company argues that its franchise from the county vested certain rights in it and contained only one limitation—that of bearing the expense of relocation of its lines if the county changed the grade of any highway. In other words, it is contended that its rights under the franchise from the county are by reason of the contract and are limited only by the terms of the contract. The city, on the other hand, maintains that the use by a public utility of public streets is subservient to the public use, that if the company's argument had merit it would mean that a city, or county, could impair or surrender its fundamental police power by contract. The city relies upon the case of New Orleans Gaslight Co. v. Drain-

age Com., 197 U. S. 453 [25 S. Ct. 471, 49 L. Ed. 831], in support of its position. The court there said: "It is the contention of the plaintiff in error that, having acquired the franchise and availed itself of the right to locate its pipes under the streets of the city, it has thereby acquired a property right which cannot be taken from it by a shifting of some of its mains and pipes from their location to accommodate the drainage system, without compensation for the cost of such changes. It is not contended that the gas company has acquired such a property right as will prevent the Drainage Commission, in the exercise of the police power granted to it by the State, from removing the pipes so as to make room for its work, but it is insisted that this can only be done upon terms of compensation for the cost of removal." The Supreme Court of the United States, speaking of the case of New Orleans Gaslight Co. v. Louisiana Light etc. Co., 115 U. S. 650, 671 [6 S. Ct. 252, 29 L. Ed. 516], said: "Except that the privilege was conferred to use the streets in laying the pipes in some places thereunder, there was nothing in the terms of the grant to indicate the intention of the State to give up its control of the public streets, certainly not so far as such power might be required by proper regulations to control their use for legitimate purposes connected with the public health and safety." And, quoting from the same case, it was said: "'The constitutional prohibition upon state laws impairing the obligation of contracts does not restrict the power of the State to protect the public health, the public morals, or the public safety, as the one or the other may be involved in the execution of such contracts. Rights and privileges arising from contracts with a State are subject to regulations for the protection of the public health, the public morals, and the public safety, in the same sense, and to the same extent, as are all contracts

and all property, whether owned by natural persons or corporations.'" The court further said: "The drainage of a city in the interest of the public health and welfare is one of the most important purposes for which the police power can be exercised. The Drainage Commission, in carrying out this important work, it has been held by the Supreme Court of the State, is engaged in the execution of the police power of the State." And "It is admitted that in the exercise of this power there has been no more interference with the property of the gas company than has been necessary to the carrying out of the drainage plan. There is no showing that the value of the property of the gas company has been depreciated nor that is has suffered any deprivation further than the expense which was rendered necessary by the changing of the location of the pipes to accommodate the work of the Drainage Commission. The police power, insofar as its exercise is essential to the health of the community, it has been held cannot be contracted away. New York & N. E. Railroad Co. v. Bristol, 151 U. S. 556, 567 [14 S. Ct. 437, 48 L. Ed. 269]; Butchers' Union etc. Co. v. Crescent City etc. Co., 111 U. S. 746, 751 [4 S. Ct. 652, 28 L. Ed. 585]; Stone v. Mississippi, 101 U. S. 814, 816 [25 L. Ed. 1079]. In a large city like New Orleans, situated as it is, and the entrepot of an extensive commerce coming from many foreign countries, it is of the highest importance that the public health shall be safeguarded by all proper means. It would be unreasonable to suppose that in the grant to the gas company of the right to use the streets in the laying of its pipes it was ever intended to surrender or impair the public right to discharge the duty of conserving the public health. The gas company did not acquire any specific location in the streets; it was content with the general right to use them, and when it located its pipes it was at the

risk that they might be, at some future time, disturbed, when the State might require for a necessary public use that changes in location be made. . . .

"The need of occupation of the soil beneath the streets in cities is constantly increasing, for the supply of water and light and the construction of systems of sewerage and drainage, and every reason of public policy requires that grants of rights in such sub-surface shall be held subject to such reasonable regulation as the public health and safety may require. There is nothing in the grant to the gas company, *even if it could legally be done*, undertaking to limit the right of the State to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject insofar as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare. These views are amply sustained by the authorities." (Emphasis added.) Speaking of Chicago, Burlington etc. R. R. Co. v. Chicago, 166 U. S. 226, 254 [17 S. Ct. 581, 41 L. Ed. 979], the court said: "In the latter case it was held that uncompensated obedience to a regulation enacted for the public safety under the police power of the State was not taking property without due compensation. In our view, that is all there is to this case. The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the State, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public

work. In complying with this requirement at its own expense none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*."

Company argues that its franchise gave it vested rights which cannot be taken away without payment of compensation. In Russell v. Sebastian, 233 U. S. 195, 204 [34 S. Ct. 517, 58 L. Ed. 912, L. R. A. 1918E 882], relied upon by company in support of its contention, a gas company operating under a provision of the Constitution of California sought to lay additional pipes in streets not theretofore used by it. The city of Los Angeles, by ordinance, prohibited, in effect, the use by the company of the streets not theretofore used by it. The Supreme Court held that the grant to the gas company which resulted from an acceptance of the state's offer constituted a contract and vested in the company a property right "protected by the Federal Constitution [is], not open to dispute in view of the repeated decisions of this court." The effect of the municipal ordinance in the Russell case was to *take away* from the gas company its right to extend its mains and lines into additional streets in order to provide additional service to the people. No such rights are involved in the case at bar. We are here concerned merely with a relocation of existing lines in order to make way for a sewage system being constructed for the benefit of the public. The company's vested property right here is to continue its lines and installations at *some*, rather than a specific, *location* within the public streets. By such a relocation, property "is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law." (Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226 [17 S. Ct. 581, 41 L. Ed. 979].) In Chicago B. & Q. Ry. Co. v. Illinois, 200 U. S. 561, 605 [26 S. Ct. 341, 50 L. Ed.

596], the court said that it had "recognized the principle that injury may often come to private property as the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no *taking* of such property within the meaning of the constitutional guaranty against the deprivation of property without due process of law, or against the taking of private property for public use without compensation. To this class belongs the recent, and as we think, decisive case of New Orleans Gaslight Co. v. Drainage Commission. . . ." And, at pages 609, 610, "Upon the general subject there is no real conflict among the adjudged cases. Whatever conflict there is arises upon the question whether there has been or will be in the particular case, within the true meaning of the Constitution, a 'taking' of private property for public use. If the injury complained of is only incidental to the legitimate exercise of governmental powers for the public good, then there is no taking of property for the public use, and a right to compensation, on account of such injury, does not attach under the Constitution."

The company in support of its argument that its vested rights cannot be impaired without compensation also cites the case of City of Los Angeles v. Los Angeles Gas & Elec. Corp., 251 U. S. 32, 39 [40 S. Ct. 76, 64 L. Ed. 121], that "A franchise conveys rights, and if their exercise could be prevented or destroyed by a simple declaration of a municipal council, they would be infirm indeed in tenure and substance. It is to be remembered that they came into existence by compact, having, therefore, its sanction, urged by reciprocal benefits, and are attended and can only be exercised by expenditure of money, making them a matter of investments and property, and entitled as such against being taken without the proper

process of law,—the payment of compensation." In the Los Angeles case, *supra*, a clear distinction exists which was specifically noted by the court: "what the city did was done not in its governmental capacity—an exercise of the police power—but in its 'proprietary or quasi-private capacity' and that therefore the city was subordinate in right to the corporation, the latter being an earlier and lawful occupant of the field. The difference in the capacities is recognized and the difference in attendant powers pointed out in decisions of this court. Vilas v. Manila, 220 U. S. 345 [31 S. Ct. 416, 55 L. Ed. 491]; Russell v. Sebastian, 233 U. S. 195 [34 S. Ct. 517, 58 L Ed. 912, L. R. A. 1918E 882]; South Carolina v. United States, 199 U. S. 437 [26 S. Ct. 110, 50 L. Ed. 261]; New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453 [25 S. Ct. 471, 49 L. Ed. 831]; Vicksburg v. Vicksburg Waterworks Co., 206 U. S. 496, 508 [27 S. Ct. 762, 51 L. Ed. 1155]." (251 U. S. at pp. 38, 39.) The city in the instant case was acting in its governmental capacity—in the exercise of police powers granted to it by the state—and in the interests of the public health and welfare. The city, in the Los Angeles case, *supra*, sought to establish a lighting system of its own. It was noted that the only question was "whether a city may as a matter of public right and without compensation clear a 'space' for the instrumentalities of its system by removing or relocating the instrumentalities of other systems." (251 U. S. at p. 37.) It was specifically held: "It will be observed that we are not concerned with the duty of the corporation operating a public utility to yield uncompensated obedience to a police measure adopted for the protection of the public, but with a proposed uncompensated taking or disturbance of what belongs to one lighting system in order to make way

for another. And this the Fourteenth Amendment forbids. What the grant was at its inception it remained and was not subject to be displaced by some other system, even that of the city, without compensation to the corporation for the rights appropriated." (251 U. S. at p. 40.)

Company next argues that the state cannot impair the obligation of its contracts without compensation. From this argument company reasons that because its franchise contained only one condition—the relocation of its installations at its own expense in the event of changes in the highway grade—no other conditions may be imposed. It will be recalled that this point was specifically considered in the case of New Orleans Gaslight Co. v. Drainage Com., 197 U. S. 453 [25 S. Ct. 471, 49 L. Ed. 831]; where it was held that "The police power, insofar as its exercise is essential to the health of the community, it has been held cannot be contracted away" and that "There is nothing in the grant to the gas company, *even if it could legally be done*, undertaking to limit the right of the State to establish a system of drainage in the streets. We think whatever right the gas company acquired was subject insofar as the location of its pipes was concerned, to such future regulations as might be required in the interest of the public health and welfare." Company contends that the rules set forth in the New Orleans Gaslight case have been "disposed of very tersely" by the case of Panhandle E. Pipeline Co. v. State Highway Com., 294 U. S. 613 [55 S. Ct. 563, 79 L. Ed. 1090]. The Panhandle case involved a Delaware corporation which had obtained, by purchase, rights of ways from owners of property to construct and maintain conduits for transporting natural gas. In 1930 it purchased rights of way for pipes, auxiliary telephone lines, etc. After the pipes

were in operation, the Highway Commission of Kansas, in 1933, pursuant to statute adopted plans for new highways across the company's rights of way in several places. The state obtained permission from the owners of the fee to use the land obtained for the highways but the company refused to permit the use of its right of way. The state court had held that the new highways were being constructed under the police power of the state and that the necessary relocation of the company's installations at company expense did not constitute a taking of private property without due process of law. The Supreme Court of the United States reversed the state court holding (p. 619) that "A claim that action is being taken under the police power of the state cannot justify disregard of constitutional inhibitions." It can readily be seen that there are important distinctions between the Panhandle case and the New Orleans Gaslight case and the case at bar. In the Panhandle case the company had purchased rights of way from private owners of land for its installations. In the New Orleans Gaslight case and the case at bar, the companies were granted permission to use the subsurface of public roads already in existence. In the Panhandle case, the state desired to construct new highways over the private rights of way previously acquired by the company. The acquisition of and construction of public highways does not come within the purview of the police power but is accomplished under the power of eminent domain embraced within section 14 of article I of the Constitution of the State of California. (See Rose v. State, 19 Cal. 2d 713 [123 P. 2d 505]; Beals v. City of Los Angeles, 23 Cal. 2d 381 [144 P. 2d 839]; Bacich v. Board of Control, 23 Cal. 2d 343 [144 P. 2d 818]; People v. Ricciardi, 23 Cal. 2d 390 [144 P. 2d 799].) The Supreme Court of the United States did

not overrule, either directly or indirectly, the New Orleans Gaslight case, but distinguished it as being within the purview of the exercise of the police power as follows: "New Orleans Gaslight Co. v. Drainage Commission, 197 U. S. 453 [49 L. Ed. 831, 25 S. Ct. 471], and similar cases concerning pipes in public streets are not controlling. In them the pipes were laid upon agreement, actual or implied, that the owner would make reasonable changes when directed by the municipality." (P. 623.)

It was specifically pointed out in the New Orleans Gaslight case that the police power of the sovereignty could not be contracted away and that any franchise, such as we have under consideration here, must be considered, insofar as location of gas installations is concerned, to have been acquired subject to such future regulations as might be required in the interest of the public health and welfare. As the Supreme Court said in Chicago, Burlington etc. R. R. Co. v. Chicago, 166 U. S. 226, 254 [17 S. Ct. 581, 41 L. Ed. 979], "uncompensated obedience to a regulation enacted for the public safety under the police power of the state was not taking property without due compensation." This holding was again stated and approved in New Orleans Public Service v. New Orleans, 281 U. S. 682, 687 [50 S. Ct. 449, 74 L. Ed. 1115].

Both the city and company rely upon Merced Falls Gas etc. Co. v. Turner, 2 Cal. App. 720, 721, 723, 724 [84 P. 239], in support of their positions. The Merced case involved the relocation of some electric light poles on a city street. The company brought an action to enjoin the city and, after declining to amend its complaint, judgment was entered upon defendant city's demurrers. The court noted that "The sole contention of appellant [company] in both appeals involves the power of the city authorities to compel

or make the change in question." The court, in holding that the city had the power to compel the relocation of the poles, said: "But the constitution, in providing for the exercise and enjoyment of the franchise owned by appellant [company], did not grant an absolute, indefeasible right or easement in the particular spots of earth where its poles were planted originally, nor does the grant contain a hint that the superintendent of streets, or other officer in control thereof, exhausted his jurisdiction or power to direct or control the use of the streets by appellant, when the poles were located in the first instance . . . and therefore such regulations, or the absence of them, cannot limit or annul the general power granted to the municipality, to direct and control the manner in which the streets shall be used, and the franchise exercised. Courts will not hesitate to stay the arm of municipal power when any attempt to curtail or deny the constitutional right is made manifest or a clear abuse of discretion is shown. But they will as unhesitatingly frown upon the doctrine that the constitutional provision in question must be construed as an abdication or denial of power on the part of cities to widen, straighten, beautify and improve streets and sidewalks, and to compel property owners of every class and kind to conform to all reasonable regulations redounding to the general good." Company relies on the following language from the same case: "It may be contended that the averment of irreparable injury sufficiently shows that the regulation is unreasonable and confiscatory. The damage which has already accrued is estimated at $1,000, and it is difficult to guess why the sum total of damage resulting from the removal of all the poles may not be as easily estimated and compensated." From this company argues that the holding of the case is that the company there was entitled to damages accruing by reason of the relocation of its poles. The case cannot

be construed as contended for by company since the question of the cost of relocating the poles was not involved. The only contention made there was that the city did not have the power to compel the company to relocate its poles and any statement which did not bear upon that question is clearly dictum. Company cites many other cases in support of its position, none of which is in point. Stockton Gas etc. Co. v. San Joaquin County, 148 Cal. 313 [83 P. 54, 7 Ann. Cas. 511, 5 L. R. A. N. S. 174], held that the situs where a franchise was used was where it was to be taxed; Matter of Russell, 163 Cal. 668 [126 P. 875, Ann. Cas. 1914A 152], held that a gas company had no vested rights in streets not previously used by it for the laying of gas mains; Western Union Tel. Co. v. Hopkins, 160 Cal. 106 [116 P. 557], was concerned with the situs of a franchise as taxable property; South Pasadena v. Pasadena Land etc. Co., 152 Cal. 579 [93 P. 490], involved the sale and transfer of a franchise for the supplying of water by a private corporation to a municipal corporation; County of Los Angeles v. Southern Cal. Tel. Co., 32 Cal. 2d 378 [196 P. 2d 773], involved an attempt by the county to collect a tax from the defendant which had obtained a franchise from the state under section 536 of the Civil Code. In Matter of Application of Keppelmann, 166 Cal. 770 [138 P. 346], a municipal ordinance provided that written permission had to be obtained from the board of public works before excavations could be made in streets occupied by a gas company for its pipes and conduits. This court held that the company's rights under the constitutional grant were "not absolute" but subject to the direction of those in control of such streets. Rose v. State, 19 Cal. 2d 713, 730 [123 P. 2d 505], involved inverse condemnation proceedings; Archer v. City of Los Angeles, 19 Cal. 2d 19 [119 P. 2d 1], was erroneously decided under the police power doctrine but in

reality involved only inverse condemnation under article I, section 14, of the California Constitution. House v. Los Angeles County Flood Control Dist., 25 Cal. 2d 384 [153 P. 2d 950], involved an action in inverse condemnation for damages sustained by plaintiff because of the negligence of the defendant in the planning and construction of certain flood control channel work in the Los Angeles River. This case in effect overruled the Archer case, *supra*. Hossom v. City of Long Beach, 83 Cal. App. 2d 745 [189 P. 2d 787], involved an action to redeem land which had been sold for delinquent taxes. City of Los Angeles v. Klinker, 219 Cal. 198 [25 P. 2d 826, 90 A. L. R. 148], involved the condemnation of land for public uses and held that the buildings and other fixtures on the land must be considered in determining the owner's compensation. In Sacramento etc. Dist. v. Pacific G. & E. Co., 72 Cal. App. 2d 638 [165 P. 2d 741], a special proceeding in eminent domain under the Public Utilities Act

Company's arguments concerning *statutory* authority for payment of compensation for utility relocations are of no avail here and it is only necessary to point out that no such statutory authority exists to cover the situation with which we are here concerned.

For the foregoing reasons I am compelled to join with the majority and vote for a reversal of the judgment with directions to the trial court to enter judgment for the defendant city.

McComb, *J.*—I dissent. I would affirm the judgment for the reasons stated by the District Court of Appeal in Southern California Gas Co. v. City of Los Angeles, (Cal. App.) 318 P. 2d 735.

Schauer, *J.*, concurred.

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*A hearing was granted by the Supreme Court on February 5, 1958.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

No. 598

SOUTHERN CALIFORNIA GAS COMPANY, a corporation,

Petitioner,

vs.

CITY OF LOS ANGELES, a municipal corporation,

Respondent.

Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California.

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TOPICAL INDEX

PAGE

I.

No federal question is properly raised 1

II.

Question presented 3

III.

The "Statement of the Case" set forth in the petition is misleading in its mixture of law and facts 4

IV.

No reason exists for the issuance of the writ requested herein 6

Conclusion 8

TABLE OF AUTHORITIES CITED

CASES — PAGE

California v. Marin Municipal Water District, 17 Cal. 2d 699, 111 P. 2d 651 5

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979 7

Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596 7

Grass Valley v. Walkinshaw, 34 Cal. 2d 595, 212 P. 2d 894 4

Herndon v. State of Georgia, 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530 3

Louisville Gas & Electric Co. v. Commissioners of Sewerage of Louisville, 33 S. W. 2d 344 8

McCoy v. Shaw, 277 U. S. 302, 48 S. Ct. 519, 72 L. Ed. 891 3

Mobile, etc. R. Co. v. Mississippi, 210 U. S. 187, 28 S. Ct. 650, 52 L. Ed. 1016 3

National Water Works Co. of New York v. City of Kansas, 28 Fed. 921 8

New Orleans Gaslight Co. v. Drainage Comm. of New Orleans, 197 U. S. 453, 25 S. Ct. 471, 49 L. Ed. 831 6

New Orleans Public Service Inc. v. City of New Orleans, 281 U. S. 682, 50 S. Ct. 449, 74 L. Ed. 1115 8

People's Gas, Light and Coke Co. v. City of Chicago, 109 N. E. 2d 777 8

Radio Station WOW v. Johnson, 326 U. S. 120, 65 S. Ct. 1475, 87 L. Ed. 2092 2

Transit Commission v. Long Island Railroad Co., et. al., 253 N. Y. 345, 171 N. E. 565 8

United States Fidelity & Guaranty Co. v. State of Oklahoma, 250 U. S. 111, 39 S. Ct. 399, 63 L. Ed. 876 2

Western Gas Co. of Washington v. City of Bremerton, 153 P. 2d 846 8

RULES

	PAGE
Rules of the United States Supreme Court, Rule 19	3

STATUTES

California Public Utilities Code, Sec. 10101 et seq	5
United States Code, Title 28, Sec. 1257(2)	2
United States Code, Title 28, Sec. 1257(3)	2, 3
United States Constitution, Fourteenth Amendment	2, 6

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Brief in Opposition to Petition for Writ of Certiorari to the Supreme Court of the State of California.

Southern California Gas Company has petitioned for a writ of certiorari directed to the Supreme Court of the State of California to review the decision of that court in the above entitled matter. It is submitted that, for the reasons hereinafter set forth, the petition should be denied.

I.

No Federal Question Is Properly Raised.

Petitioner states at page 2 of its petition that

> "The jurisdiction of this Court is invoked under 28 U. S. C. 1257(2) since the rights, privileges and immunities of the Petitioner since the inception of the case have been and are now claimed under the guaranties and protections of the Constitution of the United States."

Petitioner's claim of jurisdiction must be based on 28 U. S. C. 1257 (*3*), not 28 U. S. C. 1257 (*2*) as it recites. Its so-called "claim" of protection under the United States Constitution is apparently based on (1) its allegation in Paragraph III of its second cause of action in its amended complaint that the "taking, damaging and appropriation" of its property without compensation therefor was without due process of law and thereby violated the Fourteenth Amendment to the Constitution of the United States, and (2) the claim upon the very last page of its Petition for Rehearing before the California Supreme Court that "the action of the City in requiring such relocation is a taking or damaging of the Company's rights granted to it by the franchise" and thereby entitled the company to compensation under the provisions of the Fourteenth Amendment to the United States Constitution.

The case was tried upon an agreed statement of facts. The trial court simply adopted such agreed statement as its findings of facts and concluded as a matter of law that plaintiff (petitioner herein) was entitled to a money judgment against the City in the sum stated therein. No finding was ever requested of or made by the trial court upon the relatively hidden and unhurged federal question mentioned in the amended complaint. Under such circumstances we submit that question should not be considered a *substantial* federal question and is not entitled to a review by this Honorable Court. (*U. S. Fidelity & Guaranty Co. v. State of Oklahoma*, 250 U. S. 111, 39 S. Ct. 399, 63 L. Ed. 876.) Further, the raising of a federal question at the time of seeking a rehearing before the State Supreme Court does not suffice to open such question to review in the United States Supreme Court. (*Radio Station WOW v. Johnson*, 326 U. S. 120, 65 S. Ct. 1475, 87 L. Ed. 2092; *Herndon v. State*

of Georgia, 295 U. S. 441, 55 S. Ct. 794, 79 L. Ed. 1530.)

In any event, the basis of the determination by the California Supreme Court, to wit: that the required relocation by a utility of its facilities in a public street to make way for a governmental use thereof is not a "taking" of those facilities or of the franchise or of any rights secured thereunder, is in accord with literally hundreds of cases throughout the United States, some of the strongest of which were decided by this very court (see Paragraph IV below). We neither have knowledge of nor has petitioner cited us to a single case to the contrary of the foregoing principle and thus, we submit, there is not presented to this court a matter heretofore undetermined by it as required by Rule 19 of the Rules of this Honorable Court.

The further determination of the California Supreme Court that a municipality exercises the state police power in laying its sewers within streets outside the municipal boundaries and in doing so may require the relocation of interfering utility lines therein is one solely of state concern and as such is not subject to review by this Court. (28 U. S. C. 1257(3); *McCoy v. Shaw,* 277 U. S. 302, 48 S. Ct. 519, 72 L. Ed. 891; *Mobile, etc., R. Co: v. Mississippi,* 210 U. S. 187, 28 S. Ct. 650, 52 L. Ed. 1016.)

II.

Question Presented.

Petitioner sets forth at page 2 of its petition the "Question Presented" as being whether public utility property is protected by the due process clause from forced "removal" without compensation to make way for "other underground facilities" to be installed by a "public agency" outside its own jurisdiction.

It should be noted from the Agreed Statement of Facts and from the decision of the California Supreme Court that the foregoing statement of the question presented is far beyond the issues of the instant case. The question presented and determined in the instant case is simply whether a public utility must *relocate* at its own expense its lines underlying public streets in unincorporated area to make way for a *sewer* being installed therein by a *municipality*. We wish to emphasize that the instant case involves (1) *relocation* of utility facilities, not removal thereof, (2) to make way for a *sewer*, a governmental function, not some proprietary function, and (3) at the behest of a California *municipality* having in general plenary powers (*Grass Valley v. Walkinshaw*, 34 Cal. 2d 595, 212 P. 2d 894), not some public agency of perhaps enumerated or limited powers only.

III.

The "Statement of the Case" Set Forth in the Petition Is Misleading in Its Mixture of Law and Facts.

The facts of this case are neatly and succinctly set forth in the opening paragraph of the opinion of the California Supreme Court (page 5, Appendix "B" of the Petition for Writ of Certiorari herein).

Petitioner's "Statement of the Case" is primarily an argument on the law and apparently misconstrues respondent's contentions and the express holding of the California Supreme Court. For example, petitioner first sets forth at page 3 of its petition that "Respondent City obtained its right to install a sewer in the same streets (as the petitioner) from he same County Board on December 1, 1953," and further that "The City had no power to install sewers in county streets except thusly by the grant from the County," citing California Public

Utilities Code, Section 10101, *et seq.* Quite contrary to the above, the California Supreme Court expressly stated, "Such obligations (upon the utility to relocate its facilities in county streets to make way for governmental improvements being installed by a municipality) rest on the paramount right of the people as a whole to use the public streets wherever located, and the fact that a franchise is granted by one political subdivision as an agent of the state (citations) does not defeat the right of another such agent acting in its governmental capacity to invoke the public right for the public benefit (citations). The fact that the city's use of county streets for its sewers is authorized by section 10101 of the Public Utilities Code has no bearing on the applicability of the foregoing rule. . . . In the present case . . . the city is exercising one of its most important governmental powers, a power so important that it is one of the few powers it may exercise outside of its territorial limits without express authorization (citations)." (Petition, Appendix "B", pages 7 and 8.)

Later in this "Statement of the Case" at page 3 of the petition, petitioner states that "By virtue of this grant by the County Board, the City then became possessed of a franchise similar and equal to that of petitioner, according to established State law. *California v. Marin Municipal Water District*, 17 Cal. 2d 699, 111 P. 2d 651 (1942)." The California Supreme Court, on the other hand, expressly pointed out that the *Marin* case involved a municipal water district operating in a *proprietary* capacity, and concluded that ". . . it does not follow that a franchise exercised by a city in its governmental capacity under that section (Public Utilities Code, section 10101) is subordinate to a prior franchise granted to a public utility." (Petition, Appendix "B", page 8.)

Petitioner has similarly misstated the facts when it claims at page 4 of the petition that it "has asserted a taking of its property without due process and just compensation in violation of the Fourteenth Amendment in every court below." As pointed out above, petitioner's only reference to the Fourteenth Amendment in this entire case has been a passing reference thereto in its amended complaint (upon which no finding was made) and another reference upon the last page of its Petition for Rehearing before the California Supreme Court. Furthermore, no mention whatsoever of this point was made by petitioner in the District Court of Appeal.

IV.

No Reason Exists for the Issuance of the Writ Requested Herein.

Petitioner states at page 2 of its petition that "The constitutional provision involved is the due process clause of the Fourteenth Amendment."

It is submitted that the law is clear and firmly established that a utility's property has not been "taken" within the meaning of that word as used in the Fourteenth Amendment when the relocation thereof within public streets is required to make way for a governmental improvement. The following cases are clearly illustrative of such principle.

In *New Orleans Gaslight Co. v. Drainage Commission of New Orleans,* 197 U. S. 453, 25 S. Ct. 471, 49 L. Ed. 831, the leading case on the subject, it was determined by this Court that the plaintiff company, which held an exclusive franchise to lay its gas lines in the public streets, must relocate same at its own expense so as to make way for a municipal drainage system, although no

such obligation was spelled out or even suggested within its franchise. In support of such determination it was there stated, at page 462:

> "The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets. The city made no contract that the gas company should not be disturbed in the location chosen. In the exercise of the police power of the state, for a purpose highly necessary in the promotion of the public health, it has become necessary to change the location of the pipes of the gas company so as to accommodate them to the new public work. In complying with this requirement at its own expense, none of the property of the gas company has been taken, and the injury sustained is *damnum absque injuria*."

In *Chicago, B. & Q. R. Co. v. Chicago*, 166 U. S. 226, 17 S. Ct. 581, 41 L. Ed. 979, this Court likewise held at page 252 that property damaged or injured by a relocation thereof to make way for a public use

> ". . . is not, within the meaning of the Constitution, taken for public use, nor is the owner deprived of it without due process of law."

In *Chicago, B. & Q. R. Co. v. Illinois ex rel. Grimwood*, 200 U. S. 561, 26 S. Ct. 341, 50 L. Ed. 596, it was again held that the plaintiff must assume the cost of relocation of its facilities to make way for the public improvement of an underlying water channel. In that case this Court stated at page 584, after referring to several cases involving varied subject matters, not limited to drainage cases, that:

> ". . . in each of those cases this court recognized the principle that injury may often come to private

property as the result of legitimate governmental action, reasonably taken for the public good and for no other purpose, and yet there will be no *taking* of such property within the meaning of the constitutional guaranty against the deprivation of property without due process of law, or against the taking of private property for public use without compensation. To this case belongs the recent, and as we think, decisive case of *New Orleans Gaslight Co. v. Drainage Commission, . . .*"

Similar language is found in the cases of *People's Gas. Light and Coke Co. v. City of Chicago* (Ill., 1952), 109 N. E. 2d 777; *Louisville Gas & Electric Co. v. Commissioners of Sewerage of Louisville* (Ky., 1931), 33 S. W. 2d 344; *New Orleans Public Service Inc. v. City of New Orleans* (La., 1930), 281 U. S. 682, 50 S. Ct. 449, 74 L. Ed. 1115; *Western Gas Co. of Washington v. City of Bremerton* (Wash., 1944), 153 P. 2d 846; *Transit Commission v. Long Island Railroad Co., et al.*, 253 N. Y. 345, 171 N. E. 565, 566; *National Water Works Co. of New York v. City of Kansas*, 28 Fed. 921.

Conclusion.

It is submitted that for the reasons above set forth the petition for writ of certiorari should be denied.

Respectfully submitted,

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